148 U.S. 657

# RECORD, CASE No. 13,776.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1892.**

TERM No., 185.

---

FRANCOIS GIOZZA, APPELLANT,

*vs.*

PATRICK TIERNAN, SHERIFF OF GALVESTON COUNTY, TEXAS.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

---

**FILED OCTOBER 15, 1889.**

# RECORD, CASE No. 13,776.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1892.

TERM No., 185.

FRANCOIS GIOZZA, APPELLANT,

*vs.*

PATRICK TIERNAN, SHERIFF OF GALVESTON COUNTY, TEXAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Petition for writ of *habeas corpus* | 2 | 1 |
| Exhibit A—Capias | 9 | 4 |
| B—Indictment | 11 | 5 |
| Order to issue writ, &c. | 13 | 6 |
| Writ of *habeas corpus* | 14 | 6 |
| Marshal's return | 16 | 7 |
| Answer | 17 | 7 |
| Indictment | 20 | 8 |
| Capias | 22 | 9 |
| Mandate of court of appeals | 24 | 10 |
| Agreement as to facts | 26 | 11 |
| Judgment. | 27 | 11 |
| Appearance bond | 29 | 12 |
| Bond for costs on appeal | 33 | 13 |
| Clerk's certificate | 37 | 15 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1892.

1 In the Circuit Court of the United States for the Eastern District of Texas, Holding Sessions at Galveston.

*Ex Parte* FRANCOIS GIOZZA, *Habeas Corpus.*

Be it remembered that in the above entitled and numbered cause, in which a judgment was rendered by said court, sitting at Galveston, on the 29th day of July, A. D. 1889—Honorable Aleck Boarman, judge, presiding—the following proceedings were had, to wit:

2 *Petition for Writ of Habeas Corpus. Filed July* 26, 1889.

To the honorable the circuit court of the United States for the eastern district of Texas, at Galveston, the Honorable Aleck Boarman presiding:

Your petitioner, Francois Giozza, a resident of Galveston county, respectfully represents that he is, against his will, illegally restrained of his liberty in the city of Galveston, in the county of Galveston, in the eastern district of Texas, by Patrick Tiernan, sheriff of said county, by virtue of a certain writ of capias, a copy of which is hereto annexed as a part of this petition and marked Exhibit A.

That said writ was issued from the criminal district court for Galveston county; that by the terms of said writ said sheriff is commanded to take the body of your petitioner and him safely keep in the county of Galveston *county* until the sum of four hundred and fifty dollars, imposed upon him as a fine by the judgment of said court, is paid and until the further sum of thirty-six $\frac{45}{100}$ dollars as costs is paid.

That said judgment was rendered by said court on the 19th day of March, 1889, under an indictment filed in said court on the 28th day of May, 1887.

3 That in said indictment your petitioner is charged with having unlawfully pursued, on the first day of May, 1887, in said county, the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart without first having obtained a license therefor. A copy of said indictment is hereto annexed as a part of this petition and marked Exhibit B.

That under a certain law of said State, enacted in the year 1879, it is made a misdemeanor for any person to pursue any occupation in said State upon which an occupation tax is imposed by law (of which occupations there are a large number) without first having obtained a license to pursue such occupation, and any person pursuing such occupation without a license is liable to an indictment.

That under a certain law of said State, enacted March 11, 1881, and amended April 4, 1881, an occupation tax is imposed upon the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart.

That under a certain law of said State, approved April 4, 1881, and a certain other law, approved March 29, 1887, amending the act of April 4, 1881 (both of said two acts being amendments of the

act of March 11, 1881), no person is permitted to obtain a license to pursue the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart until such person has entered into and given a bond in the sum of five thousand dollars, with two good and sufficient sureties, payable to the State of Texas, to be approved by the county judge, and containing, together with other conditions, a certain condition in substance as follows: That
4 the person giving such bond will not sell spirituous, vinous, and malt liquors or medicated bitters capable of producing intoxication to any person after having been notified in writing through the sheriff or other peace officer by the wife, mother, daughter, or sister of such person not to sell to such person; that said bond may be sued on at the instance of any such person so notifying and aggrieved by the violation of such condition in said bond, and such person so notifying shall be entitled to recover the sum of five hundred dollars as liquidated damages for an infraction and breach of said condition, and, in addition to such civil proceedings, if any person giving such bond shall violate the aforesaid conditions in such bond or any other conditions therein it is made the duty of the county and district attorneys to institute suit on such bond in the name of the State for the use and benefit of the county, and the sum of five hundred dollars shall be recovered as a penalty from the principal and sureties upon a breach of any of the conditions in said bond, and when such bond is exhausted by suit at the instance of individuals or for the use of the county a new or similar bond shall be given, and until such new bond is given the retail liquor dealer shall not have the right to further pursue said occupation, and for so doing he shall be guilty of a misdemeanor and, on conviction, shall be fined in the same amount provided for in cases where no license has been obtained.

5 That under a certain law of said State, approved March 15, 1881, any person prosecuted by indictment for pursuing without a license any occupation upon which a tax is imposed by law shall have the right at any time before conviction to have such prosecution dismissed upon payment of the tax imposed upon such occupation and all costs of such prosecution, and upon procuring the license to pursue such occupation for pursuing which without a license the prosecution was instituted.

That such license cannot be procured until the bond above mentioned is given and approved as aforesaid.

Your petitioner represents that section 20 of article 16 of the constitution of the State of Texas is as follows:

SEC. 20. The legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, or city by a majority vote from time to time may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits.

Your petitioner is advised and so charges that under said section of said constitution the legislature of said State is impliedly prohibited from passing any general law prohibiting the sale of intoxicating liquors in said State.

Your petitioner is advised and so charges that the occupation of selling spirituous, vinous, and malt liquors is recognized by the laws and public policy of the State of Texas as a legitimate and lawful occupation, and that your petitioner is now and has been the past twenty years engaged in said occupation as his
6 means of making his living.

You petitioner is advised that while the pursuit of said occupation may be made subject to all necessary police regulations it cannot be prohibited by the laws of said State, and that it cannot be prohibited indirectly by arbitrary laws, whereby the pursuit of said occupation is made to depend not alone upon a compliance with necessary police regulations and the laws of the land, but upon the mere will, consent, and approval of others who have no power or authority in law to give or to withhold such consent and to whom no such power can be given by law.

Your petitioner is advised and so charges that his right to pursue said occupation is by the aforesaid laws of said State made dependent upon and subject to the will, consent, and approval of persons of a certain class defined in said laws, and that under said laws the persons of such class are given authority to direct and control your petitioner in the pursuit of his business and to so far interfere therewith as to break him up in said business and to prevent him from engaging in said occupation and to deny to him the means of making a living.

Your petitioner represents that in order to obtain a license to pursue said occupation all persons desirous of engaging in such occupation are required by the laws of said State to pay the occupation tax imposed thereon in advance for a period of not less than twelve months, and are required to pay the tax imposed by the State and by the commissioners' courts of the several counties
7 and by the cities and towns wherein such occupation is carried on, and are required to obtain a license from the county clerk of the county in which said occupation is carried on, for which license the sum of twenty-five cents is required to be paid.

That under the laws of said State all other persons pursuing all other occupations than that of your petitioner, of which there are a large number, are permitted to pay the occupation tax on said occupations for each three months in the year, or quarterly, and no other persons pursuing other occupations than that of your petitioner in cities and towns are required to pay an occupation tax imposed by such cities or towns as a prerequisite to the obtaining of a license to pursue such occupation, and no persons pursuing any taxable occupations other than of your petitioner are required to obtain a license from such county clerk or to pay therefor the sum of twenty-five cents or any sum.

Your petitioner represents that the aforesaid laws of said State have been pronounced and adjudged by the court of appeals of said State (a court of last resort) to be valid laws and not contrary to nor inhibited by the 14th amendment of the Constitution of the United States in so far as they prescribe and impose in the bond above

mentioned the condition in such bond as hereinabove set forth, and because of such condition in such bond and in so far as said
8 laws require of persons pursuing the above-named occupation and none others as a fiscal measure or regulation the payment of the occupation tax for a period of not less than twelve months and the payment of city and town taxes as a prerequisite to obtaining a license and the payment of twenty-five cents for a license and because of such requirements.

Your petitioner complains that under the laws of said State as above set forth he is denied the equal protection of the laws and is deprived of his liberty without due process of law and in violation of the 14th amendment of the Constitution of the United States.

Wherefore, to be relieved of said unlawful restraint and detention, your petitioner prays that the writ of *habeas corpus*, to be directed to Patrick Tiernan in his official capacity, may issue in his behalf, so that your petitioner may be brought forthwith before this court to do, submit to, and receive what the law may require.

FRANCOIS GIOZZA.

L. E. TREZEVANT,
*Att'y for Petitioner.*

UNITED STATES OF AMERICA, }
*Eastern District of Texas.* }

Before the undersigned authority this day came Francois Giozza, who, being duly sworn, says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the allegations therein made are true as he verily believes.

FRANCOIS GIOZZA.

9 Subscribed and sworn to before me by Francois Giozza this 24th day of July, A. D. 1889.

[SEAL.] C. DART,
*Clerk U. S. Circuit Court, Eastern Dist. Texas, at Galveston.*

EXHIBIT A.

The State of Texas to the sheriff or any constable of Galveston county, Greeting:

Whereas at a term of the criminal district court of Galveston county, to wit, on the 19 day of March, 1889, F. Giozza was, by the judgment of said court, convicted of failure to procure a license and sentenced to pay a fine of four hundred and fifty dollars and all costs, amounting to four hundred and eighty-six dollars and forty-five cents, and that the said F. Giozza stands committed to the county jail until said fine and costs are paid:

Therefore you are hereby commanded to take the body of the said F. Giozza and him safely keep in the county jail, as the law directs, or until said fine and costs are paid.

Herein fail not, and due return make of this writ, showing how you have executed the same.

Witness M. H. Royston, clerk of the said criminal district court, with seal thereof, at Galveston, this 16th day of July, 1889.

[SEAL.] M. H. ROYSTON,
*Clerk Criminal District Court, G. C.,*
By PHILIP C. TUCKER, *D'p'ty.*

10 Indorsements: No. 7522. The State of Texas *vs.* F. Giozza. Capias pro fine. Issued July 16th, 1889. Returnable forthwith. M. H. Royston, clerk C. D. C., G. C. Received this writ on the 16th day of July, 1889, and I executed the same on the 24 day of July, 1889, by taking the body of F. Giozza and have him now in custody. Patrick Tiernan, sheriff G. C., by R. H. Tiernan, deputy sheriff.

11 EXHIBIT "B."

In the name and by the authority of the State of Texas:

The grand jurors, duly and legally drawn, selected, tried, impaneled, sworn, and charged in the criminal district court of the county of Galveston, State of Texas, at the May term thereof, in the year of our Lord one thousand eight hundred and eighty-seven, to inquire in and for the body of said county and State, upon their oaths, in said court, present that F. Giozza, late of the county aforesaid, on the first day of the month of May, in the year of our Lord eight hundred and eighty-seven, in the said county of Galveston, in the State of Texas, with force and arms, then and there unlawfully and wilfully did engage in, pursue, and follow the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart, the same being an act taxed by law, without first having obtained a license therefor, and that the said F. Giozza has not paid said tax or obtained a tax receipt or license therefor; and that said F. Giozza — indebted to the State of Texas in the sum of three hundred dollars, occupation tax for pursuing said occupation, and to said county in the sum of one hundred and fifty dollars, occupation tax for pursuing said occupation, and that the commissioners' court of Galveston county levied a tax on said occupation one-half the amount levied by the State on said occupation, contrary
12 to law and against the peace and dignity of the State.

J. E. WALLIS,
*Foreman of the Grand Jury.*

A true bill.

Indorsements: No. 7522. The State of Texas *vs.* F. Giozza. Indictment for selling spirituous, vinous, and malt liquors without first obtaining a license therefor. Bail, $—. —— ——, judge. Filed 28th day of May, A. D. 1887. M. H. Royston, clerk.

13 In U. S. Circuit Court, Eastern Dist. Texas.

On Application for Writ of *Habeas Corpus* by F. GIOZZA.

It is ordered in this case that the clerk at Galveston issue the writ as prayed for; that the writ be made returnable before me at Galveston, Texas, July 29th, 1889; that said F. Giozza be released from the custody of the sheriff of Galveston county or from the custody of the jailor of said county on the applicant's giving bond in the sum of five hundred dollars ($500.00); that said bond be taken, conditioned, and made payable according to the law of the State of Texas, which provides for the taking of appearance bonds in criminal proceedings; that it require and bind the applicant to appear before me at Galveston, Texas, July 29th, 1889, to and from day to day thereafter until a hearing or trial may be had on the matters and issues set out in his petition for said writ. It is further directed that the sheriff of said county take and accept said bond.

July 25, 1889.

ALECK BOARMAN, *Judge.*

Indorsements: No. 1556. *Ex parte* Francois Giozza, *habeas corpus.* Petition. Filed July 26th, 1889. C. Dart, clerk.

14 *Writ. Issued July 26th*, 1889.

United States Circuit Court, Eastern District of Texas, at Galveston.

The President of the United States of America to Patrick Tiernan, sheriff of Galveston county, in the eastern district of Texas, Greeting:

Whereas Francois Giozza, who alleges himself to be a resident of said Galveston county, has filed a petition in said court alleging that he is, against his will, illegally restrained of his liberty in the city of Galveston, in the county of Galveston, in the eastern district of Texas, by you, as sheriff of said county, by virtue of a certain writ of capias, a copy of which is annexed to his said petition, and praying that the writ of *habeas corpus* issue in his behalf, so that he may be brought forthwith before said court to do, submit, and receive what the law may require;

And whereas the Hon. Aleck Boarman, United States district judge and one of the judges of said circuit court, has made an order in writing upon said petition as follows, to wit:

"In U. S. Circuit Court, Eastern Dist. Texas.

"On Application for Writ of *Habeas Corpus* by F. GIOZZA.

"It is ordered in this case that the clerk, at Galveston, issue the writ as prayed for; that the writ be made returnable before me at Galveston, Texas, July 29th, 1889; that said F. Giozza be released from the custody of the sheriff of Galveston county or from the

custody of the jailor of said county on the applicant's giving
15 bond in the sum of five hundred dollars ($500.00); that said bond be taken, conditioned, and made payable according to the law of the State of Texas which provides for the taking of appearance bonds in criminal proceedings; that it require and bind the applicant to appear before me at Galveston, Texas, July 29th, 1889, to and from day to day thereafter until a hearing or trial may be had on the matters and issues set out in his petition for said writ. It is further directed that the sheriff of said county take and accept said bond.

"July 25, 1889.

"ALECK BOARMAN, *Judge.*"

Wherefore we command you that the person of Francois Giozza, by you held and restrained of his liberty as is alleged, you have before our circuit court of the United States for the eastern district of Texas, at Galveston, on Monday, the 29th day of July, 1889, together with the cause of the detention and restraint of the said Francois Giozza, to undergo and receive what our said court shall consider concerning him in this behalf, and have you then and there this writ, and that you further obey the orders and directions of the said judge as in said order set forth.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL] of the Supreme Court of the United States, and the seal of the circuit court of the United States for the eastern district of Texas, at Galveston, this the 26th day of July, 1889.

C. DART, *Clerk.*

16 *Marshal's Return on Writ.*

Rec'd this writ July 26th, 1889, and executed the same July 26th, 1889, by delivering to Pat. Tiernan, sher'f of Galveston Co., a duplicate copy of this writ, under the seal of the court, at Galveston, in my dist.

R. B. REAGAN,
*U. S. Marshal, E. D. T.,*
By JOHN M. WHELAN, *Deputy.*

Indorsements: C. L. No. 1556. *Ex parte* Francois Giozza, *habeas corpus.* Original writ. Issued July 26th, 1889. Returnable July 29, 1889. C. Dart, clerk. Returned and filed July 26, 1889. C. Dart, clerk.

17 *Answer of Defendant. Filed July 29th, '89.*

To the honorable circuit court of the United States for the eastern district of Texas, at Galveston:

In response to the writ of *habeas corpus* issued by this honorable court on the 26th day of July, A. D. 1889, upon the application of Francois Giozza, I, Patrick Tiernan, respectfully state that it is true that I have in my custody and under my restraint, acting in my

official capacity as sheriff of Galveston county, Texas, the said Francois Giozza.

On the 24th day of July, A. D. 1889, I took and now detain the said Francois Giozza by virtue of the authority and in obedience to a capias pro fine issued out of the criminal district court, holden in and for Galveston county, Texas, issued on the 16th day of July, A. D. 1889, upon a certain judgment in said court rendered on the 11th day of March, A. D. 1889, in a certain cause numbered 7522 on the docket of said court, styled the State of Texas *vs.* Francois Giozza, in which said cause the said Francois Giozza stood charged by indictment, duly found, presented, and filed in said court, with the offence in said indictment, named, a certified copy of which said indictment, with all the file-marks and endorsements thereon,
18 is hereto attached and made a part of this return, in which said cause said Francois Giozza moved for a new trial and to set aside said judgment on the 12th day of March, A. D. 1889, which said motion said court, on the 12th day of March, A. D. 1889, duly overruled; and thereupon said Francois Giozza perfected his appeal in said cause to the hon. court of appeals of the State of Texas, the court of last resort in said State to which said cause could be appealed, and said court of appeals, on the 20th day of March, A. D. 1889, duly affirmed the judgment of said criminal district court in and for Galveston county, Texas, and on the 8th day of July, A. D. 1889, said court of appeals duly issued its mandate of affirmance in said cause to said criminal district court of Galveston county, Texas, a certified copy of which mandate is hereto attached and made a part of this return, and thereafter said capias pro fine issued as hereinbefore set forth, a certified copy of which capias pro fine with endorsements, file-marks, and my return thereupon, is hereto attached and made a part of this return.

Respondent says that said criminal district court of Galveston county, Texas, had jurisdiction to try said offence with which said Francois Giozza stood charged in said cause, and said court of appeals of Texas had jurisdiction of said cause upon appeal to said court.

19 This respondent, having fully answered, prays to be discharged, and that the costs be taxed against the applicant.

PATRICK TIERNAN,
*Sheriff of Galveston County, Tex.*

Sworn to & subsc'b'd before me July 29, 1889.

C. DART,
[SEAL.] *Com'r U. S. Circ't Court, E. D. T.*

20 "Copy."

In the name and by the authority of the State of Texas:

The grand jurors, duly and legally drawn, selected, tried, impaneled, sworn, and charged in the criminal district court of the county of Galveston, State of Texas, at the May term thereof, in the year of our Lord one thousand eight hundred and eighty-seven,

to inquire in and for the body of said county and State, upon their oaths, in said court, present that F. Giozza, late of the county aforesaid, on the first day of the month of May, in the year of our Lord one thousand eight hundred and eighty-seven, in the said county of Galveston, in the State of Texas, with force and arms, then and there unlawfully and wilfully did engage in, pursue, and follow the occupation of selling spirituous, vinous, and malt liquors in quantities less than one quart, the same being an act taxed by law, without first having obtained a license therefor, and that the said F. Giozza has not paid said tax or obtained a tax receipt or license therefor; and that said F. Giozza — indebted to the Stateof Texas in the sum of three hundred dollars occupation tax, for pursuing said occupation, and to said county in the sum of one hundred and fifty dollars, occupation tax for pursuing said occupation, and that the commissioners' court of Galveston county levied a tax on said occupation, one-half the amount levied by the State on said occupation, contrary to law and against the peace and dignity of
21 the State.

J. E. WALLIS,
*Foreman of the Grand Jury.*

A true bill.

I, M. H. Royston, clerk of the crim. dist. court, hereby certify that this — a true copy.

[SEAL.] M. H. ROYSTON.

"We, the jury, find the defendant guilty as charged and assess the fine at four hundred and fifty dollars.

GEO. W. GROVER, *Foreman.*"

Indorsements: "Copy." No. 7522. The State of Texas *vs.* F. Giozza. Indictment for pursuing the occupation of selling spirituous, vinous, and malt liquors without having paid tax. Bail, $500. Gustave Cook, judge. Filed 8th day of May, A. D. 1887. M. H. Royston, clerk. Witnesses, N. Weeks.

22 "Copy."

The State of Texas to the sheriff or any constable of Galveston county, Greeting:

Whereas, at a term of the criminal district court of Galveston county, to wit, on the 23 day of March, 1889, F. Giozza was by the judgment of said court convicted of failing to pay occupation tax and sentenced to pay a fine of four hundred and fifty dollars and all costs, amounting to four hundred and eighty-six dollars and forty-five cents, and that the said F. Giozza stands committed to the county jail until said fine and costs are paid:

Therefore you are hereby commanded to take the body of the said F. Giozza and him safely keep in the county jail, as the law directs or until said fine and costs are paid.

Herein fail not and due return make of this writ, showing how you have executed the same.

Witness M. H. Royston, clerk of the said criminal district court, with seal thereof, at Galveston, this 16th day of July, 188–.

M. H. ROYSTON,
*Clerk Criminal District Court, G. C.*

I, M. H. Royston, clerk of the crim. dist. court of —, do hereby certify that this is a true copy of *capias profine* in No. 7522.

23 Witness my seal this the 29 day of July, A. D. 1889.

[SEAL.] M. H. ROYSTON, *Clerk.*

Indorsements: "Copy." No. 7522. The State of Texas *vs.* F. Giozza. *Capias profine.* Issued July —, 1889. Returnable forthwith. M. H. Royston, clerk C. D. C., G. C. Received this writ on the 16th day of July, 1889, and I executed the same on the 24 day of July, 1889, by taking the body of F. Giozza and have him now in custody. Patrick Tiernan, sheriff G. C. R. H. Tiernan, d'p'ty.

24 The State of Texas to the criminal district court of Galveston county, Greeting:

Before our court of appeals, on the 20th day of March, A. D. 1889, this cause, upon appeal to revise or reverse your judgment between F. Giozza, appellant, and The State of Texas, appellee, was determined, and therein our said court of appeals made its order in these words:

"This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this court that there was no error in the judgment" it is ordered, adjudged, and decreed that the judgment of the court below be in all things affirmed; that the appellant, F. Giozza, and his sureties, Fred. McNichols and Peter Lera, pay all costs in this behalf incurred, and this decision be certified below for observance.

Wherefore we command you to observe the order of our said court of appeals in this behalf, and in all things have it duly recognized, obeyed, and executed.

Witness the Hon. John P. White, presiding judge of our said court of appeals, with the seal thereof annexed, at the city of Galveston, this 8th day of July, A. D. 1889.

[SEAL.] H. A. MORSE, *Clerk.*

25 A true copy. I certify.
Witness my seal.

[SEAL.] M. H. ROYSTON,
*Clerk of Crim. Dist. Court.*

Indorsements: No. 7522. State of Texas *vs.* F. Giozza. "Copy of" mandate of the court of appeals.

Answer of sheriff endorsed as follows:

C. L., 1556. *Ex parte* Francois Giozza, *habeas corpus.* Answer. Filed July 29, 1889. C. Dart, clerk.

26 *Agreement of Counsel. Filed July* 30, 1889, *as of July 29th*, 1889, *Nunc pro Tunc, by Order of Court.*

In Circuit Court of the United States for the Eastern District of Texas, at Galveston.

*Ex Parte* FRANCOIS GIOZZA. No. 1556, C. L.

Now come the relator and the respondent herein, by their respective counsel, and agree that the facts stated in relator's petition as facts are true. This agreement does not include any statements of matters therein contained which are conclusions of law, and especially not the statement that the relator is illegally restrained of his liberty.

L. E. TREZEVANT,
*Att'y for Relator, Francois Giozza.*
E. D. CAVIN,
*County Attorney of Galveston County, Texas,*
*Att'y for Respondent, Patrick Tiernan.*

Indorsements: C. L., 1556. *Ex parte* Francois Giozza. Agreement of counsel. Filed July 30th, 1889, as of July 29th, 1889, *nunc pro tunc*, by order of court. C. Dart, clerk.

27 *Judgment. From Minutes, July 29th*, 1889.

In Circuit Court of United States for the Eastern District of Texas, at Galveston.

*Ex Parte* FRANCOIS GIOZZA.

On this the 29th day of July, A. D. 1889, came on to be heard the application of Francois Giozza upon *habeas corpus* and the court having duly considered thereof doth here now order that said relator, Francois Giozza, is not illegally restrained of his liberty, and that he be, and he is hereby, remanded to the custody of Patrick Tiernan, sheriff of Galveston county, respondent herein, and costs are adjudged against relator.

And said relator having given notice of appeal to the Supreme Court of the United States, whereby the order remanding said relator to the custody of said sheriff is suspended, the court doth further order that said relator enter into bond in the sum of five hundred dollars, to be approved by the clerk of this court and filed herein within ten days, conditioned for the appearance of said relator on the first day of the next term of this court, and that he remain in attendance from day to day, and from term to term to abide the decision of the Supreme Court of the United States herein.

And it is further ordered that said relator file his appeal bond in the sum of one hundred dollars, to be approved by the clerk of this court, to cover the costs of this appeal.

And upon the failure of said relator to file said bonds or either of them within ten days, such failure shall be taken as an abandonment of this appeal.

ALECK BOARMAN, *Judge.*

*Appearance Bond. Filed Aug. 6th*, 1889.

In Circuit Court of the United States for the Eastern District of Texas, at Galveston.

*Ex Parte* FRANCOIS GIOZZA. No. 1556.

Whereas on the 29th day of July, 1889, Francois Giozza was, on an application for the writ of *habeas corpus*, remanded to the custody of Patrick Tiernan, as sheriff of Galveston county, the respondent herein, by the circuit court of the United States for the eastern district of Texas, at Galveston; and whereas the said Francois Giozza gave notice in open court of an appeal from said judgment so remanding him to the Supreme Court of the United States of America, and the said circuit court having ordered that pending said appeal said Francois Giozza enter into a bond, with two good and sufficient sureties, to be approved by the clerk of this court, in the sum of five hundred dollars, to appear before said circuit court for its further action in said cause and to abide the judgment of the Supreme Court of the United States in this cause:

Now, therefore, we, the said Francois Giozza, the relator in said cause, as principal, and James S. De Forest and Edward Fries, as his sureties, hereby acknowledge ourselves severally indebted to the United States of America in the sum of five hundred dollars, conditioned that the said Francois Giozza shall be and appear before the said circuit court of the United States from day to day and from term to term thereof and not depart therefrom without leave of said court, in order to abide the judgment of the Supreme Court of the United States of America in said cause.

Witness our hands this 5th day of August, 1889, at Galveston, Texas.

FRANCOIS GIOZZA.
JAMES S. DE FOREST.
EDWARD FRIES.

Personally appeared before me, the undersigned, U. S. commissioner for the eastern district of Texas, the above-named Francois Giozza, principal, and his sureties, James S. De Forest and Edward Fries, who acknowledged in my presence that they signed, sealed, and delivered the foregoing instrument for the purposes and considerations therein set forth.

Done at Galveston, Texas, this the 5th & 6th days of August, A. D. 1889.

[SEAL.]

C. DART,
*U. S. Commissioner, Eastern Dist. Texas.*

31 *Oath to be Taken by Sureties.*

I, James S. De Forest, do swear that I am worth in my own right at least the sum of five hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; that I reside in Galveston county and have property in this State liable to execution worth five hundred dollars or more.

JAMES S. DE FOREST, *Surety.*

Sworn to and subscribed before me this the 5th day of August, A. D. 1889.

[SEAL.]

C. DART,
*U. S. Commissioner.*

*Oath to be Taken by Surety.*

I, Edward Fries, do swear that I am worth in my own right at least the sum of five hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county and have property in this State liable to execution worth five hundred dollars or more.

EDWARD FRIES, *Surety.*

32 Sworn to and subscribed before me this the 6th day of August, A. D. 1889.

[SEAL.]

C. DART,
*U. S. Commissioner.*

Indorsements: No. 1556. *Ex parte* Francois Giozza, *habeas corpus.* Appearance bond. Approved and filed August 6, 1889. C. Dart, clerk.

33 *Bond for Costs. Filed August* 6, 1889.

In Circuit Court of the United States for the Eastern District of Texas, at Galveston.

*Ex Parte* FRANCOIS GIOZZA. No. 1556.

Whereas on the 29th day of July, 1889, Francois Giozza was, on his petition for the writ of *habeas corpus*, remanded to the custody of Patrict Tiernan, as sheriff of Galveston county, the respondent herein, by the circuit court of the United States for the eastern district of Texas, at Galveston; and whereas the said Francois Giozza gave notice of appeal from said judgment so remanding him to the Supreme Court of the United States of America, and said circuit

court having ordered that said Francois Giozza, with two sufficient sureties, enter into bond in the sum of one hundred dollars, to be approved by the clerk of said circuit court, in order to secure the payment of all costs in said cause, said bond to be filed within ten days from the granting of said order:

Now, therefore, we, the said Francois Giozza, as principal, and James S. De Forest and Edward Fries, as sureties, hereby acknowledge ourselves bound to pay to Patrick Tiernan, as sheriff of Galveston county, the respondent herein, the sum of one hundred dollars, conditioned that the said Francois Giozza shall prosecute his appeal with effect and shall pay all costs which have accrued
34 in said court below or may accrue therein in said cause and which may accrue in said appellate court in said cause.

Witness our hands, at Galveston, Texas, this 5th day of August, A. D. 1889.

FRANCOIS GIOZZA.
JAMES S. DE FOREST.
EDWARD FRIES.

Personally appeared before me, the undersigned, U. S. commissioner for the eastern district of Texas, the abovenamed Francois Giozza, principal, and his sureties, James S. De Forest and Edward Fries, who acknowledged in my presence that they signed, sealed, and delivered the foregoing instrument for the purposes and considerations therein set forth.

Done at Galveston, Texas, this the 5th & 6th days of August, A. D. 1889.

C. DART,
[SEAL.] *U. S. Commissioner, Eastern Dist. Texas.*

35 *Oath to be Taken by Sureties.*

I, James S. De Forest, do swear that I am worth in my own right at least the sum of one hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property which are known to me; that I reside in Galveston county and have property in this State liable to execution worth one hundred dollars or more.

JAMES S. DE FOREST, *Surety.*

Sworn to and subscribed before me this the 5th day of August, A. D. 1889.

[SEAL.] C. DART,
*U. S. Commissioner.*

*Oath to be Taken by Surety.*

I, Edward Fries, do swear that I am worth in my own right at least the sum of one hundred dollars after deducting from my property all that which is exempt by the constitution and laws of the

State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Galveston county and have property in this State liable to execution worth one hundred dollars or more.

EDWARD FRIES, *Surety.*

36 Sworn to and subscribed before me this the 6th day of August, A. D. 1889.

[SEAL]

C. DART,
*U. S. Commissioner.*

Indorsements: No. 1556. *Ex parte* Francois Giozza, *habeas corpus.* Bond for costs. Approved and filed Aug. 6, 1889. C. Dart, clerk.

37 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all the proceedings in cause No. 1556 on the law docket of said court, entitled *Ex parte* Francois Giozza, *habeas corpus,* as the same now appears on file and of record in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 8th day of August, A. D. 1889.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
*Clerk U. S. Circuit Court, E. D. T., at Galveston,*
By W. L. HANSCOM, *Deputy.*

[Endorsed:] No. 1556. United States circuit court, eastern district of Texas. *Ex parte* Francois Giozza, *habeas corpus, vs.* ——. Copy of the record and all the proceedings in said cause.

Endorsed on cover: Case No. 13,776. E. Texas C. C. U. S. No. 185. Francois Giozza, appellant, *vs.* Patrick Tiernan, sheriff of Galveston county, Texas. Filed October 15, 1889.

148 U.S. 65-7

Office Supreme Court U. S.
FILED.
JAN 4 1893
JAMES H. McKENNEY,
CLERK.

No. 1776

# In the Supreme Court

## OF THE UNITED STATES,

OCTOBER TERM, 1892.—TERM NO. 185.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

---

FRANCOIS GIOZZA, APPELLANT,

vs.

PATRICK TIERNAN (Sheriff), APPELLEE.

---

## BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

Francois Giozza, the appellant, was indicted in the Criminal District Court of Galveston county, Texas, and was charged with having pursued the occupation of selling spirituous, vinous and malt liquors in quantities less than one quart without having obtained a license therefor. Appellant was tried, was adjudged guilty of the charge and was fined in the sum of $450. Appellant was then arrested and held in his custody by Patrick Tiernan as sheriff of Galveston county under and by authority of a *capias pro fine* issued from said Criminal Court wherein said sheriff was commanded to take the body of appellant and him safely keep in the county jail as the law directs or until said fine and costs are paid. Appellant then applied for and obtained from the Circuit Court of the United States for the Eastern District of Texas, then in session at Galveston, Texas, a writ of habeas corpus directed to said Patrick Tiernan in his official capacity as aforesaid. To this writ the said Patrick Tiernan made return that he held appellant in his custody by authority of the *capias pro fine* above mentioned.

Appellant set forth in his petition for the writ of habeas corpus as grounds for the writ that by the laws of the state no person is permitted to obtain a license to pursue said occupation, until such person has given a bond in the sum of $5000, payable to the state of Texas and containing among other conditions a certain condition in substance as follows: that the persons giving such bond will not sell spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person, after having been notified in writing through the sheriff or other peace officer by the wife or mother or daughter or sister of such person not to sell such person; that such bond may be sued on at the instance of any person so notifying and aggrieved by the violation of such condition

in said bond, and such person so notifying shall be entitled to recover the sum of $500 as liquidated damages for an infraction of such condition, etc.

Appellant charges in said petition that it is not competent for the legislature of the state of Texas to impose the condition above stated as a condition precedent to the obtaining of a license to pursue said occupation, and that the statute of said state, in so far as it imposes such conditions operates a denial of the equal protection of the laws, and deprives appellant of his property without due process of law and is repugant to the Fourteenth amendment of the constitution of the United States.

Appellant sets forth in his petition as grounds for the writ of habeas corpus, that in order to obtain a license to pursue the occupation aforesaid, all persons desiring to engage in said occupation are required by the laws of said state to pay the occupation tax imposed thereon in advance, for a period not less than twelve months, and are required to pay the tax imposed by the state and by the commissioner's courts of the several counties, and by the cities and towns wherein such occupation is carried on, and are required to obtain a license from the county clerk of the county in which said occupation is carried on, for which license the sum of twenty-five cents is required to be paid, while all other persons pursuing all other occupations than the one pursued by appellant are permitted by the laws of said state to pay the occupation tax on said occupations for each three months or quarterly, and no persons pursuing other taxable occupations than that pursued by appellant in cities and towns are required to pay the occupation tax imposed by such cities or towns as a prerequisite to obtaining a license to pursue such occupations, and no persons pursuing any taxable occupation other than that pursued

by appellant, are required to obtain a license from such county clerk or to pay therefor any sum.

Appellant charges in his petition that under the laws aforesaid he is denied the equal protection of the laws and is deprived of his property without due process of law and that said laws are repugnant to the fourteenth amendment of the constitution of the United States.

Upon a hearing appellant was, by the judgment of the court, remanded to the custody of the sheriff of Galveston county Appellant gave notice of appeal and the court ordered that the appellant give bond for his appearance to abide the decision of the Supreme Court of the United States, which bond was given, and appellant now prays for a reversal of the judgment of the Circuit Court and presents the following:

*Assignment of Errors.*

The court erred in holding that the legislature of the State of Texas has the power to prescribe in a bond to be given as a condition precedent to obtaining a license to pursue the occupation of selling spirituous, vinous and malt liquors and medicated bitters in quantities less than one quart, a condition of the following purport, to-wit: That the obligor in the bond will not, under the pains and penalties prescribed in the bond, sell nor permit to be sold in his house or place of business nor give nor permit to be given any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication to any person after having been notified in writing through the sheriff or other peace officer by the wife, mother, daughter or sister of the person not to sell to such person.

*Second Assignment of Error.*

The court erred in holding that the legislature of the State of Texas has the power to require by law that all persons desiring

to engage in the occupation of selling spirituous, vinous and malt liquors and medicated bitters in quantities less than a quart shall pay in advance for a period of not less than twelve months, the occupation tax imposed on such occupation, while all other persons pursuing all other taxable occupations in said State are not required so to pay the occupation tax imposed on such occupations and are permitted to pay such occupation tax for each three months in the year or quarterly.

*Third Assignment of Error.*

The court erred in holding that the legislature of the state of Texas has the power to require by law that all persons desiring to engage in the occupation of selling spirituous, vinous and malt liquors and medicated bitters in quantities less than a quart shall pay the tax imposed by the state and by the commissioners' courts of the several counties and by the incorporated cities and towns wherein such occupation is carried on, and that the legislature has the power to require by law that such persons shall obtain from such county clerks a license to engage in such occupation, for which license the sum of twenty cents shall be paid, while no other persons pursuing other taxable occupations in incorporated cities and towns are required to pay the occupation tax imposed by such cities and towns as a prerequisite to obtaining a license to pursue such occupations and no persons pursuing any taxable occupations other than that of selling spirituous, vinous and malt liquors are required to pay the sum of twenty-five cents, or any sum, for a license.

*Fourth Assignment of Error.*

The court erred in holding as a conclusion of law that the relator was not illegally restrained of his liberty and in remanding him to the custody of the sheriff of Galveston county.

The statute, the validity of which is drawn in question, is as follows:

Section 1. Hereafter there shall be levied upon and collected from any person, firm or association of persons engaged or engaging in the business of selling spirituous, vinous or malt liquors or medicated bitters an annual tax upon every such occupation or separate establishment as follows: For selling spirituous, vinous or malt liquors or medicated bitters in quantities less than a quart, three hundred dollars.

Sec. 2. The commissioners' courts of the several counties in this State shall have power to levy and collect taxes upon each of the occupations herein named equal to one-half of the state tax herein levied upon said business; and, where any such occupation or calling is carried on in an incorporated town or city, such town or city shall have power to levy and collect an additional tax upon such occupation or calling equal to that levied by such commissioners' courts.

Sec. 3. Every person, firm or association of persons desirous of engaging in the business of selling spirituous, vinous or malt liquors or medicated bitters, shall before engaging in such business, pay to the collector of taxes of the county wherein such business shall be pursued, the entire annual tax herein levied for state purposes, according to the particular class of business in which such person, firm or association of persons may wish to engage, and the entire annual tax upon such business as shall or may be levied by the commissioners' court of said county, and, in case the selling of said spirituous, vinous or malt liquors or medicated bitters shall be carried on in an incorporated town or city, the person, firm or association of persons so selling, shall, in addition to the state and county tax herein required to be paid in advance, pay to the collector of

taxes in and for such town or city, such tax as may be levied upon such business by such town or city, and all taxes herein required shall be paid in advance for periods of not less than twelve months.

Sec. 4. Any person, firm or association of persons desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall, before engaging in such occupation be required to enter into bond in the sum of five thousand dollars, with at least two good, lawful and sufficient sureties, payable to the state of Texas, to be approved by the county judge, conditioned that said person, firm or association of persons so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in quantities less than a quart, shall keep an open, quiet and orderly house or place for the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication; and that he will not sell or permit to be sold in his or their house or place of business, nor give, nor permit to be given, any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, to any person under the age of twenty-one years, or to a student of any institution of learning, or to any habitual drunkard, or to *any person after having been notified in writing through the sheriff or other peace officer by the wife, mother, daughter or sister of the person not to sell to such person;* (there are other conditions irrelevant to this cause) which said bond may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such persons shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the conditions of such bond, and the said bond shall not be void on the first recovery, but may be sued until the full penal sum named therein shall have been recovered.

In addition to civil proceedings for individual injuries brought on said bond as above indicated, if any person, firm or association of persons shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon in the name of the State of Texas for the use and benefit of the county, and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon a breach of any of the conditions thereof.

Sec. 5. The county clerks in the several counties in this state shall issue license to any person, firm or association of persons engaged or desiring to engage in the sale of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication upon payment by such person, firm or association of persons of all occupation taxes herein levied for state purposes and such additional occupation taxes as shall be levied by commissioners' courts and by incorporated towns or cities, and also filing the bond required in section 4 of this act. The evidence of payment of all tax upon such occupation shall be the receipt of the county collector of taxes for such amount of tax as shall have been or may be assessed and collected for State and county purposes upon such occupation and the receipt of the city collector of taxes for the amount of such tax paid any city or town wherein such business or occupation may be carried on.

If any county clerk shall issue a license to any dealer in intoxicating liquors without first requiring the bond provided for in this act, he shall be fined not less than one hundred nor more than five hundred dollars.

For issuing the license herein provided for the county clerk shall be entitled to charge and receive a fee of twenty-five cents for each license so issued. (Art. 3226a, Sayles Rev. Stat. of Texas.)

Article 110 of the Penal Code of Texas is as follows: "Any person who shall pursue or follow any occupation, calling or profession or do any act taxed by law without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due and not more than double that sum."

Article 112. "Any person prosecuted under Article 110 of the Penal Code of the state of Texas shall have the right at any time before conviction to have such prosecution dismissed upon payment of the tax and all costs of said prosecution and procuring the license to pursue or follow the occupation for the pursuing, which, without license, the prosecution was instituted, and no prosecution shall be commenced against any person after the procuring of said license, notwithstanding they may have followed such occupation, calling or profession before procuring said license; provided, said license shall cover the time said person has actually followed said occupation, calling or profession. The county clerk shall be entitled to ten cents for issuing the license to be paid by the person to whom it is issued."

Article 16, Section 20 of the constitution of the State of Texas is as follows:

"The legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town or city, by a majority vote, from time to time, may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

Article 16, Section 42 of the constitution of the State of Texas is as follows:

"The legislature may establish an inebriate asylum for the cure of drunkeness and reform of inebriates."

The legislature of the State of Texas by a resolution adopted March 4, 1887, submitted to a vote of the people at an election

held on the first Thursday in August, 1887, the following resolution and amendment to Article 16, Section 20 of the constitution of the State:

"Be it resolved by the legislature of the State of Texas, that Section 20 of Article 16 of the constitution be so amended as to read as follows, towit: 'Section 20. The manufacture, sale and exchange of intoxicating liquors, except for medical, mechanical, sacramental and scientific purposes, is hereby prohibited in the State of Texas. The legislature shall at the first session held after the adoption of the amendment, enact necessary laws to put this provision into effect.'"

This proposed amendment was rejected by a large majority vote of the people at said election; of all which this court takes judicial cognizance.

Appellant was pursuing in the city of Galveston in the county of Galveston the occupation of selling spirituous, vinous and malt liquors in quantities less than a quart without having obtained a license therefor under the statute above recited.

Appellant submits the following propositions:

I.

It is not the policy of the State of Texas to prohibit the sale of intoxicating liquors and it is not competent for the legislature of the State of Texas to prohibit by law the sale of intoxicating liquors, and the occupation of selling intoxicating liquors in the State of Texas can no more be subjected to invidious and discriminating legislation apart from the rightful exercise of the police power, than other taxable occupations.

II.

The legislature of the State of Texas has no power by a statute to subject the pursuit of a legitimate occupation to the

will or discretion of any person, and the legislature has no power to authorize any person to prohibit the pursuit of an occupation which the law licenses and the public policy of the state recognizes as a legitimate occupation. The law is the definition and the limitation of power, and nothing less than the law—nothing other than the law can regulate or control the right of the citizen to make a living or pursue his happiness in his own way, and no occupation which is licensed and recognized by law can be treated as a nuisance *per se*.

III.

The statute is not, in the particular in question, limited in its operation to the case of an intemperate or inebriate husband, father, son or brother, nor to the minor, but applies as well to the total abstainer, and has no regard to the propriety or the exigency of the occasion, and is beyond and aside from any excuse or reason for its operation as a police measure, even if the exercise of the police power could be so delegated.

IV.

In so far as the statute prescribes as a condition in the bond to be given by the liquor dealer that after notification to him in writing by any woman not to sell to her husband, her father, her son or her brother, he will not sell to such person under the penalty prescribed in such bond, the statute subjects the pursuit of the occupation to the will of the women of the country, and sets up the theory that this is a government of women and not of laws and not of men as well, and said statute is repugnant to the Fourteenth amendment of the constitution of the United States and is not due process of law.

AUTHORITIES.

Yick Wo vs. Hopkins, 118 U. S., 35.

Quong Woo, 13 Fed. R., 229 Fields J.

Wo Lee, 26 Fed. R., 471.

People vs. Haug, 37 N. W. R., 21 (Mich.).

Frazee's Case, 63 Mich., 396.

State vs. Goodwill, 10 S. E. R., 285. (W. Va.)

Millett vs. People, 117 Ill., 294.

City of Richmond vs. Dudley, 28 N. E. R., 312.

Anderson vs. City of Wilmington, 19 Pac. R., 719.

V.

In so far as the statute requires that all persons engaging in the occupation in question shall pay in advance for a period of not less than twelve months, the occupation tax imposed on such occupation while all other persons pursuing all other taxable occupations are permitted to pay their occupation tax for a period of less than twelve months, the statute discriminates against the liquor dealer and is repugnant to the Fourteenth amendment of the constitution of the United States.

VI.

In so far as the statute requires that the liquor dealer shall pay the tax imposed by the state and by the commissioners' courts of the counties and by the incorporated cities and towns wherein such occupation is carried on as a prerequisite to obtaining a license, while no other persons pursuing other taxable occupations in incorporated cities and towns are required to pay the occupation tax imposed by such cities and towns as

a prerequisite to obtaining a license, and in so far as the statute requires that the liquor dealer shall pay for a license the sum of twenty-five cents, while other persons pursuing other taxable occupations are required to pay only the sum of ten cents for such license, the statute discriminates against the liquor dealer and is repugnant to the Fourteenth amendment of the constitution of the United States.

VII.

The process of collecting a tax is not within the domain of the police power or within its exercise.

Tiedman on Police Power, 286.

VIII.

In the matter of levying and collecting the tax in question the statute is a special law, the effect of which is to make exactions in the process of collecting the tax and in obtaining the tax receipt that are not made in the collection of other occupation taxes imposed upon other occupations.

Article 8, Section 3 of the constitution of the state of Texas is as follows: "Taxes shall be levied and collected by general laws."

IX.

The theory of our institutions is that all men are equal before the law in their rights, immunities and legal capacities.

A state has no business to bestow favors or to establish unequal discriminations.

Unequal exactions in every form and under any pretence are absolutely forbidden by the Fourteenth amendment of the constitution of the United States.

2 Story on Const., sec. 1961.

Cooley's Const. Lim. [392].

San Mateo vs. So. Pac. Ry., 13 Fed., R. 722, Fields J.
Van Zandt vs. Waddell, 2 Yerger, 260.
Bank vs. Cooper, 2 Yerger, 605.
Walley's Heirs vs. Kennedy, 2 Yerger, 554.
Jones vs. Reynolds, 2 Texas, 250.
People vs. Com. Council, 38 N. W. R., 470.
City of Jacksonville vs. Carpenter, 77 Wis.
Ragio vs. State, 6 S. W. R., 401.
City of St. Louis vs. Spiegel, 2 S. W. R., 839.
Clark vs. Free Press, 72 Mich., 560.
State vs. Penoyer, 18 Atlantic R., 878.

J. M. BURROUGHS,
Counsel for Appellant.

148 US 657

Office Supreme Court U. S.
FILED.
MAR 3 1893
JAMES H. McKENNEY,
CLERK.

NO. 185.

# In Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

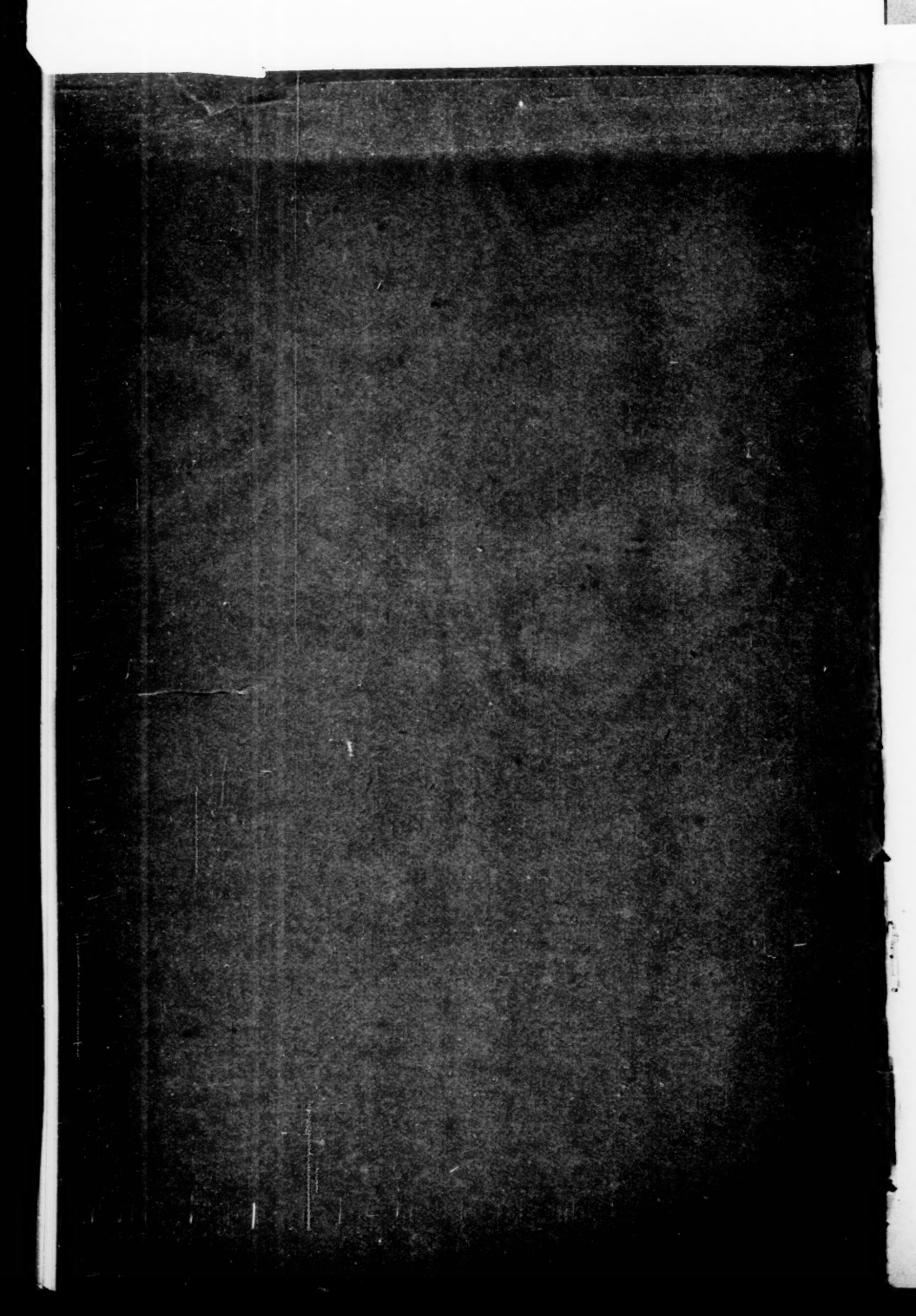
FRANCOIS GIOZZA, APPELLANT,

v.

PATRICK TIERNAN (SHERIFF), APPELLEE.

## BRIEF FOR APPELLEE.

C. A. CULBERSON,
Attorney General of Texas.
R. L. BATTS, Assistant,
Counsel for Appellee.



NO. 185.

# In Supreme Court of the United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FRANCOIS GIOZZA, APPELLANT,

v.

PATRICK TIERNAN (SHERIFF), APPELLEE.

## BRIEF FOR APPELLEE.

### STATEMENT OF THE CASE.

Appellant's statement of the case is accepted.

### BRIEF.

I.

*Under the decisions of this court, the action of the Circuit Court in remanding the relator to the custody of the State officers, is not error, even though the statute complained of is in contravention of the Constitution of the United States.*

When a person charged with a violation of a State law is arrested, and makes application to be released upon a writ of habeas corpus, upon the contention that the law under which he is held is in contravention of the Constitution of the United States, it is within the discretion of the court to grant or refuse the writ. The court, in the exercise of that comity which should charac-

terize the relations between the different branches of the judiciary, may and should insist that the defendant exhaust the ordinary and regular remedies given by appeal and writ of error before asking one court to interfere with another, co-ordinate as to the subject matter, by a writ of habeas corpus.

The duty of preserving inviolate the Constitution of the United States does not devolve more upon the Federal judiciary than upon the courts of the States, and the assumption should be, and will be, indulged that when a State law is violative of that Constitution the State court will so declare it, and that when an inferior State court improperly holds as to the constitutional question involved, the superior court will, upon appeal, correct the error.

In relator's application for habeas corpus it is said that the Court of Appeals of this State had held the law under which he was arrested constitutional. This allegation, taken as true, could not affect the application to this case of the rule above mentioned. The decision of a court in any case is not a matter of foreknowledge. Courts of final resort are not absolutely bound by former decisions. They are not under obligation to perpetuate error. The rule of comity above suggested, and which is recognized by the Federal and all courts, suggests that the superior court be permitted to pass upon the case, even though there be a moral certainty that it will err in its judgment.

Even after a court of last resort of the State has entertained an appeal in such a case as the one presented, and has decided that the law under advisement is not unconstitutional, the Circuit Court would still have the discretion to insist that a final appeal should be had to this court, and to deny the writ of habeas corpus. While, under the statutes of the United States, the Circuit Court would have the authority to grant the writ before trial or at any time during the pendency of the cause, yet this authority would rarely be exercised so long as the complainant had adequate protection in his rights of appeal and his writs of error. The writ of habeas corpus ought not, and usually will not, be permitted to subserve the end properly accomplished by appeal or error.

It having been within the discretion of the court to refuse the writ under the circumstances presented, although the law may be in violation of the Constitution of the United States, there is no error, and this court should affirm the judgment of the Circuit Court.

Ex Parte Royall, 117 U. S., 24 et seq.
Ex Parte Fonda, 117 U. S., 516.
Cook v. Hart, 13 S. C. Rep., 39.
Ex Parte Wood, 140 U. S., 278.

## II.

*The law of which appellant complains, and which he quotes in his statement of facts, is not in contravention of the fourteenth amendment to the Constitution of the United States, or any other part of that Constitution.*

(1) The only part of the Constitution with which the law could possibly conflict are the following provisions of the fourteenth amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

There is no conflict with the first provision quoted; the law applies to every person. It makes no distinction between classes. It affects alike the rich and the poor, the virtuous and the wicked. It discriminates against no one. It abridges the privileges and immunities of no one. If it discriminates at all, and this is denied, it is against a certain business, and not against a "citizen of the United States," nor "any person." The law is applicable to all persons alike. It affects all persons in this State engaged in the sale of liquors in exactly the same manner and degree. A law which equally affects all persons of a certain class, or engaged in a certain business, is not open to the objection that it abridges the privileges or immunities of any one, or discriminates as to one over another.

A legislative act which applies to and embraces all of a class of persons who are or may come into like situation or circumstances is not partial. "The Constitution is violated only when a privilege extended to one is denied to another on substantially the same fact."

Smith v. Judge, 17 Cal., 540.
Roberts v. City of Boston, 5 Cush., 198.
Ward v. Flood, 48 Cal., 36.
Munn v. Illinois, 94 U. S., 113.
Phillips v. Railroad, 86 Miss., 540.
Pac. Ex. Co. v. Selbert, 142 U. S., 352.

(2) Appellant is not deprived of life and property without "due process of law."

The judgment against him may be erroneous, but it is pronounced by a legally constituted court in the exercise of its legal functions.

As to payment of taxes and fees, the law deprives him of no property. He need not pay the tax nor secure the license. It is a matter entirely within his discretion. If he chooses to part with his property he is not deprived of it. Whatever loss he sustains is the result of his voluntary action.

Railway v. Hines, 115 U. S., 512.
Davidson v. New Orleans, 96 U. S., 97.

III.

*The Legislature of Texas has, and always has had, the authority to place such restrictions upon the sale of liquor as it should consider advisable, or to entirely prohibit such traffic, subject only to the power of Congress to regulate interstate commerce.*

It is a primary proposition that the Legislature of a State has all legislative power not delegated to the Federal Government and not prohibited by the fundamental State law. There may be some intangible restrictions imposed by the very nature of American institutions, but the general rule must be that there are no limitations upon the powers of a State Legislature except those imposed by the written Constitutions.

The prohibition of the liquor traffic is not contrary to the nature and genius of our government. Attempts have been made in many of the States to suppress the business by prohibitory laws.

There is nothing in the Constitution of this State limiting the power of the Legislature to prohibit the sale of liquor. It has many sections placing limitations upon the legislative authority. No limitation is placed upon its authority in the matter considered. There are also a number of constitutional directions to the Legislature. Among these is the following, which is referred to in appellant's brief: "The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justice's precinct, town, or city, by a majority vote, may from time to time determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits."

In addition to the authority inherent in the Legislature to restrict or prohibit it throughout the State, provision was made to give to each locality the right to say that intoxicating liquors should not be sold.

The circumstance that the people of Texas have refused to pass an amendment to the Constitution prohibiting the sale of liquor can be accepted as proof of nothing except that they are willing to trust the matter to the Legislature, in the hope that high license and proper restrictions will mitigate what is regarded as a great evil, without seriously interfering with the rights or desires of citizens.

The attributes of sovereignty exercised through State legislatures will not be destroyed by implication. An inherent right of the Legislature will not be considered limited, much less abrogated, by a constitutional provision which makes it the Legislature's duty to exercise that right in a limited degree. It is the right of the Legislature to prohibit the sale of liquors; it is the duty of the Legislature to provide for prohibition at the will of the people in each locality.

If the Legislature can prohibit the sale of liquors altogether, it can, if it should choose to permit the traffic, place upon it such restrictions and limitations as it may consider proper.

IV.

*The Legislature in the proper exercise of its police powers may prohibit the sale of intoxicating liquors.*

AUTHORITIES:

License Cases, 5 How., 504.
Mugler v. Kansas, 123 U. S., 623.
Austin v. State, 10 Mo., 59.
Bartemeyer v. Iowa, 18 Wall., 129.
State v. Brennan, 25 Conn., 278.
State v. Common Pleas, 36 N. J., 72.
State v. Prescott, 27 Vt., 194.
State v. Gurney, 37 Me., 156.
State v. Mugler, 29 Kans., 252.
State v. Rowe, 3 R. I., 185.
Jones v. People, 14 Ill., 196.

V.

*The Legislature in the proper exercise of its police power may place such reasonable restrictions upon the sale of intoxicating liquor as it may desire.*

*In re* Rahrer, 140 U. S., 554.
License Cases, 5 How., 504.
Barbier v. Connolly, 113 U. S., 31.

VI.

*Even if the Legislature in the exercise of police powers could not properly absolutely prohibit the sale of intoxicating liquors, still it has been held that it would unquestionably have, in the exercise of such powers, authority to prohibit saloons and the retailing of spirituous liquors therein.*

"There is an all sufficient reason for the prohibition of drinking saloons if the Legislature should deem it expedient to prohibit them. It is that they constitute the places for meeting for all the more or less disreputable and dangerous classes of the

community, and breaches of the peace of a more or less serious character almost invariably occur in bar rooms. The suppression and control of the public disorders caused by the keeping of saloons constitute a heavy burden on the tax payers, and the cause of them may be removed by a prohibitory law."

Tied. Lim. Pol. Pow., p. 309.

If the Legislature in the exercise of its police powers has authority to prohibit saloons, it necessarily follows that it has authority to place such restrictions upon the business, and to impose such conditions upon the person engaged in it as it may deem advisable.

Ex Parte Bell, 24 Texas Ct. App., 428.

Bell v. State, 28 Texas Ct. App., 96.

## VII.

*The provisions of the law about which relator complains are proper provisions in the exercise of police powers.*

It has evidently been the policy of the State to permit as great latitude as possible in the exercise of personal inclinations and desires. The liquor traffic has not been prohibited because it has been thought possible that its great evils could be prevented without abridging the rights of citizens who are not injured by it.

Those dependent on its victims are the most injuriously affected by the traffic. The law which complainant has violated attempts to protect these.

Laws are especially enacted for the benefit of idiots, lunatics, and others who are victims of misfortune and folly; it is not unreasonable to protect the drunkard from the author of his misfortunes, or the wife from the source of all her ills.

In a reasonable and guarded manner the Legislature, in the law complained of, attempts an end that would promote the prosperity, the morality and the health of the country.

If a result of the right of women to interfere in behalf of their husbands and their homes should be the destruction of the business, there would arise no occasion to complain, since the Legis-

lature has the right, it has been held, directly or indirectly, to destroy the traffic.

Goldsticker v. Ford, 62 Texas, 389.

Mugler v. Kansas, 123 U. S., 623.

## VIII.

*The law complained of by relator was properly passed by the Legislature in the exercise of its taxing powers.*

Upon the taxing power of the State there are no limitations except those imposed by the State Constitution.

The Constitution of the State expressly gives authority to the Legislature to impose occupation taxes. No limitation is placed on the Legislature as to how it shall exercise this power; the amount to be taxed against each industry or occupation is left to its absolute discretion.

In exercising the legislative discretion in fixing the amount to be paid by any one occupation, the amount of business done, the profit received, the effect upon the public health and morals, and the amount of trouble and expense occasioned the State by the business are considered.

By this standard the tax imposed is not unreasonable; the liquor business, notwithstanding the large tax imposed, doubtless costs the State much more than is received from it.

## IX.

*The conditions of the bonds to be given by the liquor dealer are reasonable, and are properly required in the exercise of the taxing power.*

The amount of occupation tax, fixed with reference, among other things, to the trouble and expense to be occasioned the State by the carrying on of the business, is placed at a stated sum. In view of the regulations imposed upon the traffic, this is supposed to be sufficient. If liquor dealers were unrestricted in their methods of doing business; if they were permitted to keep disorderly houses; if they were permitted to sell to minors and

drunkards, it would perhaps be necessary and proper that the tax should be increased; it would perhaps be considered expedient for the State to entirely deprive herself of this revenue by entirely prohibiting the business.

## X.

*The provisions of the law that require payment by the person desiring to engage in the liquor business of twenty-five cents to the clerk for the issuance of a license is not a discrimination, and is a proper provision in the exercise of the taxing power.*

In every instance in which license is required by the law of the State provision is made for compensation of the person doing the work incident to the issuance of the license.

In case of license to practice law in the Supreme Court of Texas, the standing of an examination and the payment of an occupation tax are required, and to these an added fee of $5 to the clerk issuing the license.

Occupation taxes could be increased and made to include the amount which the State pays as a proper compensation to its officers for issuing a license, or, as in the present case, the service rendered could be directly paid for by the person receiving the license. If it were a fact that licenses to engage in other businesses were issued upon a smaller fee than is required in this case, discrimination is not necessarily involved. The examination of a bond and the preparation of a license require more labor than the mere issuance of a license. If license to carry on other businesses are issued entirely without fee, it does not follow that there is an infringement upon the privileges or immunities of anyone; no person can demand to be treated other than with justice. The fee payable to the clerk is a reasonable one, and its collection can give no one the right to complain.

The provisions with regard to the license are proper in the exercise of taxing power, because in this business it is conceived necessary in order that the revenue laws may be enforced to require evidence that may at all times be visible that the tax has been paid.

In the regulation of all such occupations it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expense of issuing the license and to maintain the police supervision.

Tiedeman Lim. Pol. Pow., 274.
Boston v. Schaffer, 9 Pick., 415.
Welch v. Hotchkiss, 39 Conn., 140.
Johnson v. Philadelphia, 60 Pa. St., 445.
State v. Hoboken, 41 N. J. L., 70.
Ash v. People, 11 Mich., 347.
Van Baalen v. People, 11 Mich., 347.
Burlington v. Putnam, 51 Iowa, 102.

The validity of such regulations as are prescribed by the laws complained of is not an open question in this court. Similar regulations have been enacted by Congress and the several States from time to time. With reference to the States, it has been said by this court that the entire matter "is wholly within the discretion of the Legislatures."

License Tax Case, 5 Wallace, 462.
Pervear v. Commonwealth, 5 Wallace, 475, 480.

## XI.

*Even if it be a fact that the conditions of the bond required by the law under consideration are unreasonable and unconstitutional, the judgment of the Circuit Court is not erroneous.*

Relator does not allege in his complaint and it is not shown by the statement of the case that relator has paid the occupation tax required by law, nor that he has tendered the same to the State, nor that he has, after paying such occupation tax, applied for a license to carry on his occupation. In the absence of such statement of fact no other judgment could have been rendered. It does not follow that because a part of a law is in contravention of a Constitution that the whole law must be declared invalid. In the law under consideration the giving of a bond and the issuance of a license are entirely separable from the section requiring payment of an occupation tax; the former provision can be en-

tirely eliminated without in any degree affecting the other. Relator is constrained of his liberty for non-payment of an occupation tax legally imposed by a valid statute—by a part of the statute which can not be attacked.

It is respectfully submitted that the judgment appealed from is the only one that could properly have been rendered.

C. A. CULBERSON,
Attorney General of Texas.

R. L. BATTS, Assistant,
Counsel for Appellee.